Supreme Court, U. S.
FILED
MAR 12 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1243

JEAN L. WERNET,

Appellant,

vs.

STATE OF MINNESOTA,

Appellee.

On Appeal From the Supreme Court Of The State of Minnesota

MOTION TO DISMISS OR AFFIRM

Robert J. Alfton
City Attorney
City of Minneapolis
C. Lynne Fundingsland
Assistant City Attorney
Hennepin County Government Center
17th Floor, Administration Tower
Minneapolis, Minnesota 55487
Telephone: (612) 348-2021

1979—Northwest Brief Printing Co., 316 Chicago Avenue, Minneapolis 55415—338-5078

TABLE OF CONTENTS

Page

Question Presented 2

Statement of the Case 2

Minneapolis Theater Licensing Ordinance 3

Argument:

I. The denial provisions of the Minneapolis Theater Licensing Ordinance clearly meet constitutional standards 6

II. Appellant lacks standing to challenge the revocation provision of the Minneapolis Theater Licensing Ordinance 10

III. The Minneapolis Theater Licensing Ordinance fee system is constitutional in that it is designed to defray the costs of furthering a substantial governmental interest 12

IV. Appellant has failed to prove that the Minneapolis Theater Licensing Ordinance disclosure requirements have a substantial "chilling effect" upon First Amendment rights 14

Conclusion 17

TABLE OF AUTHORITIES

Cases:

Alexander v. City of St. Paul, 303 Minn. 201, 227 N.W.2d 370 (1975) 12

Bell v. Hongisto, 501 F.2d 346 (9th Cir. 1974) 11

Bigelow v. Virginia, 421 U.S. 809 (1975) 10, 11, 15

Buckley v. Valeo, 424 U.S. 1 (1976) 14, 15, 16

Chemline, Inc. v. City of Grand Prairie, 364 F.2d 721 (5th Cir. 1966) 7, 13

Erwin v. City of Dallas, 85 F. Supp. 103 (N. D. Tex. 1949) 8

Freedman v. Maryland, 380 U.S. 51 (1965) 11
Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1966) 6
Laird v. Tatum, 408 U.S. 1 (1972) 10
Lovell v. City of Griffin, 303 U.S. 444 (1938) 8
Lyons v. City of Minneapolis, 241 Minn. 439, 63 N.W. 2d 585 (1954) 13
Massachusetts v. Mellon, 262 U.S. 447 (1923) 10
Murdock v. Pennsylvania, 319 U.S. 105 (1943) 8
NAACP v. Alabama, 357 U.S. 449 (1958) 14, 15
Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969) 8
Star v. Preller, 352 F. Supp. 530 (D. Md. 1972) 11
Staub v. City of Baxley, 355 U.S. 313 (1958) 8
Talley v. California, 362 U.S. 60 (1960) 15
United Public Workers v. Mitchell, 330 U.S. 75 (1947) 10
Wajda v. City of Minneapolis, 310 Minn. 339, 246 N.W.2d 455 (1976) 9
Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976) 6

Statutes:

Minnesota Statutes §609.02, Subd. 4a (1976) 2

Ordinances:

Minneapolis City Ordinance §367.010 .....2, 3
Minneapolis City Ordinance §367.055 8

IN THE

Supreme Court of the United States

October Term, 1978

No. ———

JEAN L. WERNET,

Appellant,

vs.

STATE OF MINNESOTA,

Appellee.

On Appeal From the Supreme Court Of The State of Minnesota

MOTION TO DISMISS OR AFFIRM

Appellees move the Court to dismiss the appeal herein, or, in the alternative, to affirm the Order of the three-judge District Court for the County of Hennepin, and the Order of the Minneapolis Supreme Court denying Appellant's petition to appeal, on the following grounds:

1. The Hennepin County District Court correctly applied principles of constitutional law enunciated by this Court.

2. The questions on which the decision of the cause rests are so insubstantial as not to require further argument.

QUESTION PRESENTED

Was the Hennepin County District Court correct in holding the Minneapolis Theater Licensing Ordinance constitutional and thereby affirming the conviction of Defendant-Appellant?

STATEMENT OF THE CASE

Appellant Jean L. Wernet was arrested on June 7, 1976, for operating a theater without a license, in violation of Minneapolis Code of Ordinances §367.010 (currently numbered as §267.1800). Appellant moved to dismiss the charges against her on the basis of the unconstitutionality of the ordinance. On September 22, 1976, the Honorable C. William Sykora, Judge of Hennepin County Municipal Court, denied Appellant's motion to dismiss, upholding the constitutionality of the theater licensing ordinance.

The matter then came on for trial on October 1, 1976, before the Honorable Daniel R. Hart, Judge of Hennepin County Municipal Court. At this time, the charge against Appellant was certified as a petty misdemeanor, which, under Minnesota Statute §609.02, Subd. 4(a), does not constitute a crime. Appellant was found guilty of having operated and conducted a moving picture theater without being licensed under the ordinance, and was fined $100.00; such fine was stayed for a period of one year.

Appellant appealed her conviction to the Hennepin County District Court. On July 31, 1978, in an Order and Memorandum, a three-judge panel unanimously affirmed the trial court's conviction of the Appellant.

On August 8, 1978, Appellant petitioned the Hennepin

County District Court for a rehearing of its Order and Memorandum dated July 31, 1978.

On September 18, 1978, the District Court entered an Order denying Appellant's motion for rehearing.

Appellant then filed a petition for permission to appeal to the Minnesota Supreme Court from the Hennepin County District Court.

On October 24, 1978, the Minnesota Supreme Court denied Appellant's petition for permission to appeal.

MINNEAPOLIS THEATER LICENSING ORDINANCE

Minneapolis Code of Ordinances §§367.010 et seq., which provide as follows:

> "367.010. License Required. No person shall operate or conduct a legitimate theater or moving picture theater without being licensed under this chapter.
>
> 367.020. Application for License. Any person desiring a license under this chapter may file with the Department of Licenses and Consumer Services an application in writing. The application shall be in such form and require such information as the department deems reasonably necessary and shall contain the following:
>
> 1) The name and home address of the applicant;
> 2) The relationship of the applicant to the business.
> 3) The name and location of the business; and
> 4) The full name, residence and address, date of birth and place of birth of each applicant, owner, manager, partner (if partnership), officer and director (if corporation), and other persons who will have charge, maintenance or control of the business or the premises.

367.025. Insurance requirements. Each applicant for a license under this chapter shall file with the City Clerk a public liability insurance policy or certificate of insurance from a company authorized to do business in Minnesota, insuring the applicant against any and all loss arising out of the use, operation or maintenance of the theater. The policy of insurance shall be in limits of not less than one hundred thousand dollars for injury or loss to one person, three thousand dollars for each occurrence, and fifty thousand dollars property damage. The policy or certificate shall contain an endorsement as provided by §300.17 under this Code of Ordinances. No cancellation of any insurance policy shall be valid except upon thirty days prior written notice to the City. Failure to keep in full force and effect, insurance required herein is grounds for revocation of the license.

367.030. City Divided into Zones. For the purpose of licenses under this chapter, the City is divided into zones entitled Zone 1, Zone 2, and Zone 3, which shall consist of the following territory:

Zone 1. All that part of the City except that portion lying between the Mississippi River and the west side of Grant Street and between Fourth Avenue North and Fourth Avenue South.

Zone 2. All that part of the City lying between Fourth Avenue North and Fourth Avenue South and between the Mississippi River and the east side line of Fourth Street.

Zone 3. All that part of the City lying between Fourth Avenue North and Fourth Avenue South and between the west side line of Fourth Street and the east side line of Grant Street.

367.040. License Fee. The annual fee for licenses under this chapter shall be as shown in the following table:

LICENSING OF VARIOUS ACTIVITIES

Size of Theater	Zone 1	Zone 2	Zone 3
Up to 400 Seats	$ 72	$ 95	$235
401 to 600 Seats	95	118	279
601 to 1,000 Seats	118	140	373
1,001 to 1,500 Seats	140	189	467
1,501 to 2,000 Seats	140	235	557
Over 2,000 Seats	140	235	930

367.050. Expiration Date. All licenses shall expire on October 1 of each year.

367.055. Denial of Application. An application may be denied, after notice and hearing thereon, for any of the following reasons:

1) The application contains false, fraudulent or deceptive statements.

2) The applicant has not complied with any provision of this chapter.

3) The proposed operation is not in compliance with any law relating to zoning, health, fire, building or safety requirements.

4) The applicant or owner, manager, partner, officer or director of the business, has been convicted within the past three years of any law relating to zoning, health, fire, building, or safety in the operation of a theater.

367.060. Revocation of License. Any license issue under this chapter may be revoked in accordance with §16, chapter 4 of the City Charter.

Conviction of the licensee or the licensee's principal employees for a violation of Minnesota Statutes, §617.291 through 617.297, or a conviction for a violation of the Minneapolis Code of Ordinances, §870.080, shall constitute grounds for suspension or revocation of the theater license.

Advertising by the licensee on the exterior of a theater by means of any picture, photograph, drawing, or similar visual representation, or image of a person or portions of the human body which depicts nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, as defined in Minn. Stat. §617.292 on any theater shall constitute grounds for suspension or revocation of the theater license."

ARGUMENT

I.

THE DENIAL PROVISIONS OF THE MINNEAPOLIS THEATER LICENSING ORDINANCE CLEARLY MEET CONSTITUTIONAL STANDARDS.

It is well established that cities can license motion picture theaters, *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1966); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). In *Young*, this Court stated:

> "The mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances." *Young*, 427 U.S. at 62.

Therefore, the issue is not, as Appellant contends, that First Amendment rights, as they attach to commercial movies are so fundamental as to be immune from valid regulation under police power. The issue is whether a regulatory scheme which deals with First Amendment rights, such as theater licensing, is reasonably related to a substantial governmental interest, and whether that scheme is narrowly drawn to accomplish a specific purpose. *Chemline, Inc. v. City of Grand Prairie*, 364 F.2d 721 (5th Cir. 1966).

A. THE DENIAL PROVISIONS ARE DIRECTLY RELATED TO A LEGITIMATE AND SUBSTANTIAL GOVERNMENTAL INTEREST.

The Minneapolis Theater Licensing Ordinance is written to provide for the health, safety and comfort of all screen and stage theater patrons, as well as the general public. That the City of Minneapolis has a legitimate and substantial governmental interest in its health and safety responsibilities, is not open to question. The propriety of furthering such interests by requiring theaters to conform to health, building, electrical, fire and safety standards, likewise cannot be questioned. *Chemline, Inc.*, supra at 728.

However, the City's health and safety interests in the operation of a screen or stage theater extend beyond merely determining whether those theaters are in compliance with zoning, fire, health, and building codes at the time of license application. The city also has a substantial interest in being able to locate persons responsible for the operation of a theater in case of an emergency, in assuring that the theater will be financially responsible for accidents or injuries to persons or property, and in acting to prevent the occurrence or repetition of substantial health and safety hazards.

The power of a municipality to require a license to protect its substantial interests implies the power to deny a license for sufficient cause. *Erwin v. City of Dallas,* 85 F. Supp. 103 (N.D. Tex. 1949). Minneapolis Theater Licensing Ordinance §367.055 enumerates four specific reasons for which a license application may be denied. The ordinance applies equally to all types of theaters. Not one of the bases for denial even tangentially authorizes the denial of a theater license for reasons of content. In fact, the Hennepin County District Court specifically held that the grounds specified for denial relate directly to the City's interest in its citizens' health and safety (see J.S. App. A at 4a).

B. DISCRETION TO DENY A LICENSE IS SUFFICIENTLY LIMITED SUCH THAT THE DENIAL PROVISIONS DO NOT CONSTITUTE A PRIOR RESTRAINT ON FREEDOM OF EXPRESSION.

To avoid an unconstitutional prior restraint on First Amendment rights, the regulatory scheme must have "narrow, objective, and definite standards to guide the licensing authority", in the decision to grant or deny a license. *Shuttlesworth v. City of Birmingham,* 394 U.S. 147, 151 (1969). Appellant contends that the Minneapolis Theater Licensing Ordinance is unconstitutional on its face. A reasonable reading of the ordinance shows that this regulatory scheme is factually distinguishable from the cases upon which Appellant relies in her Jurisdictional Statement. In the cases Appellant cites, the licensing authorities had uncontrolled discretion to grant or deny licenses and permits. *Lovell v. City of Griffin,* 303 U.S. 444 (1938); *Murdock v. Pennsylvania,* 319 U.S. 105 (1943); and *Staub v. City of Baxley,* 355 U.S. 313 (1958).

The Minneapolis Theater Licensing Ordinance sufficiently circumscribes the discretionary powers of the City Council by delineating four specific, unambiguous grounds for which a theater license may be denied. The Hennepin County District Court, after considering exhaustive briefs, agreed with the City's position. (See J.S. App. A at 4a). Appellee submits that these standards do not allow the decision to deny a license to be based on content of the expression or on a subjective evaluation of the applicant's character.

It is well settled that a city council cannot act arbitrarily, capriciously, or unreasonably, and that its administrative decisions are subject to judicial review. *Wajda v. City of Minneapolis,* 310 Minn. 339, 246 N.W.2d 455 at 457 (1976). Considering the health and safety interests of the City and the type of regulation necessary to further these interests, it would be difficult, if not impossible, to write an ordinance that does not call for some exercise of judgment.

From the jury trial, through the state appellate procedure, and now before this Court, the appellant has not shown which of the denial provisions fail to meet narrow, specific and definite standards. Neither has she shown that these denial provisions fail to relate to the City's health and safety interests. Appellee submits that, absent such a showing, Appellant's contention that the denial provisions of the Minneapolis Theater Licensing Ordinance are unconstitutional raises no substantial federal questions meriting review by this Court.

II.

APPELLANT LACKS STANDING TO CHALLENGE THE REVOCATION PROVISION OF THE MINNEAPOLIS THEATER LICENSING ORDINANCE.

A. APPELLANT HAS FAILED TO PROVE THAT THE REVOCATION PROVISIONS OF THE MINNEAPOLIS THETER LICENSING ORDINANCE HAS CAUSED, OR IS LIKELY TO CAUSE, INJURY.

It is well settled that the constitutionality of laws may only be challenged by persons who have sustained, or who are immediately in danger of sustaining, some direct injury as the result of the enforcement of a certain law. *Massachusetts v. Mellon*, 262 U.S. 447 (1923). This injury must be real, as distinguished from being remote, general, or hypothetical. *United Public Workers v. Mitchell*, 330 U.S. 75 (1947). More recently, this court has stated that, for a person to have standing, ". . . an individual must present more than 'allegations of a subjective chill.' There must be a 'claim of specific present objective harm or a threat of specific future harm.' " *Bigelow v. Virginia*, 421 U.S. 809 (1975), citing *Laird v. Tatum*, 408 U.S. 1 (1972).

Appellant in this case lacks standing to challenge the constitutionality of the revocation provision of the Minneapolis Theater Licensing Ordinance, in that she has shown no injury or likelihood of injury to be caused by the operation of the revocation provision. Appellant has never obtained a license to operate the theater in question. Having never obtained a license, Appellant cannot be heard to contend that she has been injured by the provision regarding license revocation.

Appellant furthermore has not shown in what manner she may be injured by the revocation provision. As stated in *Bigelow*, supra, to have standing to challenge a law when there is no claim of specific present harm, the Appellant must prove a threat of specific future harm. The burden of proving the nature and immediacy of a future harm has not been met by the Appellant.

B. APPELLANT IS LIMITED TO CHALLENGING THE CONSTITUTIONALITY OF ONLY THAT PART OF THE ORDINANCE WHICH CAUSES, OR MAY CAUSE, INJURY.

A corollary of the general standing principle is that, if the law which is sought to be challenged contains separable provisions, the party may challenge only those provisions which operate to cause harm. A party cannot be heard to challenge those provisions which do not cause injury and are not likely to cause injury. *Bell v. Hongisto*, 501 F.2d 346 (9th Cir. 1974).

This Court has held that constitutional attacks on licensing statutes are permissible by persons who have not applied for a license and whose conduct, under a properly drawn statute, would be prohibited. *Freedman v. Maryland*, 380 U.S. 51 (1965). However, in *Star v. Preller*, 352 F. Supp. 530 (D. Md. 1972), vacated on other grounds, 413 U.S. 905 (1973), the court denied plaintiff standing to challenge those licensing provisions regarding revocation, and restricted the challenge to only those sections which led up to and resulted in a license being granted or denied.

The Hennepin County District Court applied the law as set forth in *Freedman*, supra, and *Star*, supra, and con-

cluded that revocation provisions may only be challenged when interdependent with remaining provisions, or where the revocation section contributes to the infirmity of the other sections (see J.S. App. A at 6a). That court found neither requisite present in this case and denied Appellant standing to challenge the revocation provision. The Minnesota Supreme Court found no reason to overturn this ruling.

Appellant relies heavily upon the decision in *Alexander v. City of St. Paul*, 303 Minn. 201, 227 N.W.2d 370 (1975), to support her contention that she has standing to challenge the constitutionality of the revocation provision of the Minneapolis Theater Licensing Ordinance. In *Alexander*, supra, the city was seeking to revoke that appellant's license. Therefore, the appellant in *Alexander* clearly had standing to challenge the revocation provision of the ordinance. In addition, the other cases cited by Appellant do not deal directly with the issue of standing which is presented here.

Appellee submits that Appellant lacks standing to challenge the revocation provision of the Minneapolis Theater Licensing Ordinance. Lacking standing, Appellant raises no substantial federal question meriting review by the Court.

III.

THE MINNEAPOLIS THEATER LICENSING ORDINANCE FEE SYSTEM IS CONSTITUTIONAL IN THAT IT IS DESIGNED TO DEFRAY THE COSTS OF FURTHERING A SUBSTANTIAL GOVERNMENTAL INTEREST.

It is well established that where cities can regulate business activities, they may also require the payment of a li-

cense fee to cover the cost of that regulation, and to offset increased municipal expenses resulting from the operation of the business. *Chemline, Inc.*, supra, *Lyons v. City of Minneapolis*, 241 Minn. 439, 63 N.W.2d 585 (1954). It is also well established that persons attacking the validity of an ordinance which imposes license fees have the burden of proof of showing that the fees are excessive. *Lyons*, 63 N.W 2d at 589.

Appellant, in this case, has done no more than to assert that the license fees bear no reasonable relation to the costs of furthering the City's health and safety interests. Even had Appellant gone beyond this mere assertion, Appellee submits that the City established the reasonableness of its fee system in the lower courts. The Hennepin County District Court agreed with the City. (See J.S. App. A at 7a). The Minnesota Supreme Court found no reason to review this finding.

Under the Minneapolis Theater Licensing Ordinance, the distinctions in the fee schedule are by location and size. Certainly, the City Council, in passing this ordinance, could reasonably have concluded that theaters of different sizes and in different areas impose different costs on the City. This is particularly obvious in light of the fact that the zones with the highest fees encompass theaters where the buildings are older, density is much higher, and access problems are more acute. It becomes apparent that inspection, police and fire protection costs in these zones are greater than in other zones. Therefore, the fee system is reasonable in that it is rationally based upon costs involved in providing these services.

Appellant at trial, as District Court Appellant, and now, while before this Court, has made no factual showing of

the excessiveness of the fees. Appellant has clearly failed to sustain her burden of proof and Appellee urges that this issue does not constitute a substantial federal question meriting review by this Court.

IV.

APPELLANT HAS FAILED TO PROVE THAT THE MINNEAPOLIS THEATER LICENSING ORDINANCE DISCLOSURE REQUIREMENTS HAVE A SUBSTANTIAL "CHILLING EFFECT" UPON FIRST AMENDMENT RIGHTS.

A. APPELLANT HAS FAILED TO MAKE THE FACTUAL SHOWING REQUIRED TO RAISE THE ISSUE OF CHILLING EFFECT" ON FIRST AMENDMENT FREEDOMS.

Appellant alleges that the disclosure requirements of the Minneapolis Theater Licensing Ordinance operate as a chilling effect upon the exercise of First Amendment rights. The standards set forth in *NAACP v. Alabama,* 357 U.S. 449 (1958), and reaffirmed in *Buckley v. Valeo,* 424 U.S. 1 (1976), clearly states that there must be alleged a specific "chill" to a definable group of people, and a factual showing of "chilling effect" before a court will consider the issue.

This Court has used a balancing test to determine whether the reasons advanced for the enactment of statutes or ordinances are constitutionally sufficient to justify the possible deterrent effect upon the exercise of First Amendment freedoms. In *Buckley,* supra, this Court stated that disclosure requirements of ordinances or statutes must serve substantial governmental interests. When this Court has found the governmental interest insufficient to support

the disclosure requirements, this Court has stressed the fact that the disclosure involved was compelled disclosure of membership in groups engaged in advocacy, and that such disclosure might deter peaceful discussions of public matters of importance. *NAACP v. Alabama,* supra; *Buckley,* supra; *Talley v. California,* 362 U.S. 60 (1960).

Appellant does not state what individual rights are burdened by the ordinance disclosure requirements. She does not suggest in what way the burden upon individual rights is greater than the governmental interest. Appellant does not claim to represent, be a member of a group, or to be herself engaged in the dissemination of ideas where identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance. In fact, Appellant has made no showing whatsoever of any "chilling effect" on the exercise of her First Amendment rights. In order to be heard to challenge the ordinance in such a fashion, Appellant must set forth more than allegations of a "subjective chill." *Bigelow v. Virginia,* supra. Appellant has done no more here than to merely allege some vague "chill" upon First Amendment rights.

B. THE CITY'S INTEREST IN HEALTH AND SAFETY IS SUFFICIENT TO OVERCOME ANY SLIGHT "CHILLING EFFECT" ON FIRST AMENDMENT RIGHTS INVOLVED IN THIS LIMITED DISCLOSURE.

Appellee submits that, even if Appellant had made a factual showing of a "chilling effect", the City's interests here are substantial enough to outweigh any "chilling effect" on First Amendment rights. If a "chilling effect" exists, there must be a "relevant correlation" or "substantial relation" between the governmental interest and the infor-

mation required to be disclosed. *Buckley*, supra. The City's interest in preserving the health and safety of people attending commercial theaters is directly related to the request that names and addresses of persons in control of the theater be disclosed on the theater license application. Birthdates and places of birth are also directly related to the City's interest as a means of verifying the legal ages of persons operating theaters. These disclosure requirments are minimal in nature and apply to all theaters in the City of Minneapolis.

Cases cited by Appellant are inapplicable to this case. In those decisions, this Court could not find a substantial relation between the governmental interest and the information sought to be disclosed. The language of this Court makes it clear that the "chilling effect" in those cases was a result of the infringement upon associational rights and beliefs. Such is not the case here. Further, none of these cases dealt with situations involving theaters open to the public. The City has a legitimate right to protect the public which may attend these theaters.

Appellee, therefore, submits that Appellant has failed to prove a definable "chill" as required by this Court. Appellee further submits that the disclosure provision does not create a "chilling effect", in that it is substantially related to the City's health and safety interests. Therefore, Appellant has raised no new questions which merit review by this Court.

CONCLUSION

The Hennepin County District Court properly applied the principles enunciated in the decisions of this Court. Since that court opinion is not in conflict with decisions of this Court or of any other court, the appeal herein should be dismissed or the decision of the Hennepin County District Court should be summarily affirmed.

Respectfully submitted,

ROBERT J. ALFTON
City Attorney
City of Minneapolis
C. LYNNE FUNDINGSLAND
Assistant City Attorney
JAMES A. WESTERHAUS
Law Clerk
A-1700 Government Center
Minneapolis, Minnesota 55487
Telephone: (612) 348-2021